Supreme Court, U.S.
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No. 92-970

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

Woods Petroleum Corporation,

Petitioner,

vs.

**Cheyenne-Arapaho Tribes of Oklahoma,
United States of America,
Department of the Interior,
Secretary of the Interior,
Anadarko Area Director, Bureau of Indian Affairs,
and Concho Indian Agency Superintendent,**

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Cheyenne-Arapaho Tribes of Oklahoma (the ``Tribe'') and the remaining respondents (the ``Federal Respondents'') have opposed Petitioner Woods Petroleum Corporation's (``Woods'') Petition for Writ of Certiorari, contending that: (1) the courts below have not yet usurped the discretionary authority of the Secretary of Interior (the ``Secretary''), (2) no inter- or intra-circuit conflict exists upon which to base certiorari, and (3) no issue of sufficient gravity to warrant review is present. These contentions have no basis in law and ignore the facts below.

REPLY TO COUNTERSTATEMENTS OF THE CASE

The Tribe asserts, wholly without supporting citation, that Woods has ``grossly mischaracterize[d] the facts and proceedings in this case.'' Brief In Opposition To Petition For A Writ Of Certiorari (the ``Tribe's Opposition'') at 1. This assertion is simply wrong. The facts giving rise to this dispute and the proceedings below are accurately set forth in Woods' Statement of the Case and fully supported by the Certiorari Appendix. Thus, the Tribe's naked assertions of mischaracterization provides no proper basis to oppose certiorari.

Woods does not dispute the factual assertions set forth by the Federal Respondents in their Brief For The Federal Respondents In Opposition (the ``Federal Opposition''). Woods does take exception to the extent that the Federal Respondents imply that Woods was obligated, despite Section 9 of the Woods Leases, to obtain additional tribal consent to communitization. Federal Opposition at 6.

REPLY TO ASSERTED REASONS FOR DENYING THE WRIT

Respondents assert various reasons that certiorari should be denied. However, none of these reasons is supported by the existing law or the appellate record.

I. CERTIORARI IS NOT PREMATURE

The Tribe contends that a grant of certiorari would be premature because ``the lower courts have not yet addressed the question of whether the communitization agreements should be given effect in whole or in part.''[1] *Id.* at 9. This argument ignores the express rulings of both the district court and the Court of Appeals, as well as existing law.

The Court of Appeals has ruled that the Secretary failed to consider lease-market conditions as one of the economic factors in his review of communitization. However, the Court of Appeals went on to conclude that, notwithstanding the Secretary's exclusive grant of discretionary authority to approve communitization *even after weighing this additional factor*, the Woods Communitization Agreements were void. Respondents argue that this does not constitute judicial usurpation of the Secretary's discretionary authority -- yet. This argument, of course, begs the very question presented by this appeal: May a court, rather than the Secretary, who has been vested with the exclusive decisional authority, conclude that the final rejection of a proper plan of communitized development is mandated as a matter of law, because the Secretary failed to consider one of several factors in his prior review?[2]

The Tribe represents to this Court that the courts below ``expressly reserved'' and ``expressly stated'' that the Woods Communitization Agreements were not void ``in toto.'' Tribe's Opposition at 10-11. This representation is patently untrue. The district court, in its May 26, 1989 order, reserved

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[1]The Federal Respondents, while not adopting this argument, appear to concur with the Tribe. Federal Opposition at 15 n.10.

[2]If, on remand to the Secretary, he determined that communitization should be approved, even in light of a new factor, the approval would relate back to the date of the communitization agreements' submission to the Secretary, thus preserving the original Indian leases. *See Cotton Petroleum Corp. v. United States Dep't of Interior*, 870 F.2d 1515, 1523 n.1 (10th Cir. 1989).

only the question of the distribution of revenues, *assuming the invalidity of the communitization agreements.* Tribe's Resp. App. at 2.[3] There is no portion of the district court's order that even hints that the court's finding of invalidity as to the communitization agreements would be the subject of further review. *Id.*

Similarly, the suggestion that the Court of Appeals found the Woods Communitization Agreements to be anything but totally invalid, strains the limits of credulity. The Court of Appeals ``expressly'' held that:

> [T]he communitization agreements *are not valid*, and the leases upon which drilling had not commenced as of May 10, 1981 expired on that date.

Court of Appeals Opinion, Cert. App. at 17 (emphasis added). There exists no good faith basis to the claim that the Court of Appeals, in some way, did not mean what it said, that its finding of invalidity was in some way qualified, limited, or for some purposes but not for others.[4] Thus, the rulings below have impermissibly crossed the boundary

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[3]The Tribe urges that the district court should be allowed to make final revenue distribution decisions, based on the Court of Appeals' improper ruling, before this Court intervenes. Such an argument flies in the face of the very purpose of an interlocutory appeal pursuant to 28 U.S.C. §1292(b) -- to avoid further proceedings when the threshold legal ruling is determinative and may be in error. *See, e.g., Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S. Ct. 322, 94 L. Ed. 299 (1950); *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 363 (3d Cir. 1975). *See also* Fed. R. Civ. P. 1.

[4]Respondents' argument that the courts below may, after finding the Woods Communitization Agreements to be invalid, make additional rulings that these same agreements are now valid for some limited purpose is legally insupportable. *See* Tribe's Opposition at 8-9; Federal Opposition at 15 n. 10. Not only did such a ruling never come from either the district court or the Court of Appeals, but such a ruling, if made, would have flown squarely in the face of *Cotton*. *Id.*, 870 F.2d at 1527.

between exclusive administrative authority and judicial review, making certiorari from this Court proper.

II. CERTIORARI IS NECESSARY TO SUPERVISE THE COURTS BELOW

Respondents contend that the courts below have not acted in any manner sufficient to invoke this Court's supervisory authority. This contention ignores the rulings below.

A. The Rulings Below Usurp The Exclusive Discretionary Authority Of The Secretary.

Respondents argue that, because the Court of Appeals did not expressly direct the Secretary how to rule, there is no usurpation of the Secretary's authority. Tribe's Opposition at 7. This argument simply ignores the fact that the *result* of the Court of Appeals' ruling is to absolutely foreclose any exercise of discretion by the Secretary.

Exclusive discretionary authority to review and approve plans for the communitized development of Indian mineral interests has been conferred on the Secretary. 25 U.S.C. § 396d. During judicial review of such a decision by the Secretary, a ``court is not empowered to substitute its judgment for that of the agency.'' *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). *See Rust v. Sullivan*, ___ U.S. ____, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); *National Indian Youth Council v. Bruce*, 485 F.2d 97, 99-100 (10th Cir. 1973), *cert. denied*, 417 U.S. 920, 94 S. Ct. 2628, 41 L. Ed. 2d 226 (1974).

However, despite this express boundary for judicial review, the Court of Appeals did not, upon finding that the Secretary had erroneously failed to consider a relevant factor in his approval process, remand the matter to the Secretary with instructions to exercise his discretionary authority under appropriate guidelines. Instead, the Court of Appeals'

conclusion of invalidity was the same as a determination that the Secretary would have disapproved the Woods' Communitization Agreements had he considered this factor. Cert. App. at 17.

It is the Court of Appeals' determination that final rejection of the Woods Communitization Agreements was within its province, and not the province of the Secretary, that constitutes the ``unprecedented usurpation of the Secretary's congressionally conferred authority'' that is complained of by Woods. Petition for Writ of Certiorari at 9.[5]

B. The Courts' Rulings Conflict With Existing Law.

Respondents also argue that no real conflict is present between the rulings of the courts below and the existing law as articulated in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) and *Cotton*. Respondents' attempts to reconcile this conflict, however, must fail.

In *United Nuclear*, the Court of Appeals for the Federal Circuit specifically held that the refusal of the Secretary, at the request of tribal authorities, to approve a proper cooperative development plan involving Indian mineral interests, in order to cause existing Indian leases to expire, constituted an unconstitutional taking of the mineral lessee's property. *Id.*, 912 F.2d at 1438. This exact same result, the disapproval of the Woods Communitization Agreements

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[5]The Tribe's reference to *Kenai Oil & Gas, Inc. v. Department of Interior*, 671 F.2d 383 (10th Cir. 1982), does not avoid the Court of Appeals' error here. While it is true that in *Kenai*, the Tenth Circuit affirmed that economic factors could be ``relevant'' and ``may'' be considered *by the Secretary* in the review of communitization, *id.* at 387, the court affirmed the Secretary's exercise of discretionary authority in disapproving a communitization agreement. *Id.* at 388. That ruling in no way validates the Court of Appeals' ruling here, preventing the Secretary from exercising that same discretionary authority. The Tribe's accusation that Sup. Ct. R. 14.5 has been violated by failing to refer to this case is, thus, specious. Tribe's Opposition at 15 n.16.

causing the expiration of existing Indian leases, was mandated by the Court of Appeals here. Cert. App. at 17.

The Tribe attempts to resolve this inconsistency by suggesting that in *United Nuclear*, the Secretary ``delegated'' his authority whereas here, the Secretary ``exercised'' that authority. Tribe's Opposition at 14. The Federal Respondents agree with the Tribe, suggesting that in *United Nuclear*, unlike here, the Secretary was guilty of the ``abdication of independent decision-making.'' Federal Opposition at 14. These distinctions in no way address the conflict between the holdings of the two cases.

In *United Nuclear*, the court was presented with the same ``economic realities'' as the courts below. In each case, Indian mineral lessors contended that they could negotiate better leases if their existing lease could first be caused to lapse. The Federal Circuit correctly held that this factor could not justify a taking of the lessee's right to develop its lease in the customary manner. Id. at 1436 (``United justifiably believed and expected that if its mining plan met the [regulatory] requirements, the Secretary would approve it''). The property rights of Woods here are no different than the rights of the lessee in *United Nuclear*.[6] Accordingly, the

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[6]In fact, the Secretary warned the district court that:

> Spacing and pooling are a way of life in Oklahoma oil and gas management. The fact that pooling is almost always necessary in Oklahoma is something that lessees, lessors, etc., are aware of, particularly, in relation to leasing for and exploration of deep gas where 640 acres spacing prevails. The Anadarko Area's leases contain what is referred to as a pooling clause. This clause permits lessors to share proportionately in all royalties from the designated unit well located within the spacing area. . . . Lessees, therefore, when bidding on leases do so with the general knowledge that their area of interest is either spaced at 640 for deep gas, or will be, and that only one well per that area may be allowed. Lessors are also aware of this factor. Naturally, they enter into a contract in the belief that the acquired leasehold allows them to develop or to become part of a unit, and to otherwise share rights in the same reservoir.

Cert. App. at 97-98.

Secretary properly approved reasonable communitization agreements submitted during the term of the Indian leases.[7]

The Federal Respondents attempt to direct attention away from this conflict by noting that the processes that resulted in the taking, *i.e.*, ``abdication'' of authority in *United Nuclear* and usurpation of authority here, are different. This is true. However, it is the result -- *the unconstitutional taking* -- that is prohibited by *United Nuclear*, and that was allowed by the Court of Appeals in this case.

In *United Nuclear*, it was the Secretary that occasioned the unconstitutional taking by refusing to approve a proper cooperative development plan. Here, the Secretary acted properly, approving communitization, *but the Court of Appeals* substituted its judgement for the Secretary's and effected the same type of unconstitutional taking. Thus, it is the Court of Appeals' ruling, not the Secretary's decision, that is directly contrary to *United Nuclear*.

As to *Cotton*, the Tribe's attempted distinction defies logic.[8] The Tribe contends that:

> In *Cotton*, the Tenth Circuit struck down the Secretary's approval of a communitization agreement because he had considered only the economic factor, and ignored all other relevant factors.

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[7]The Federal Respondents assert that Woods has ``no vested right to have its leases extended beyond their primary terms by approval of any particular communitization agreements.'' Federal Opposition at 14. The reliance by the United States on *Boesche v. Udall*, 373 U.S. 472, 83 S. Ct. 1373, 10 L. Ed. 2d 491 (1963) and *Gray v. Johnson*, 395 F.2d 533 (10th Cir.), *cert. denied*, 392 U.S. 906, 88 S. Ct. 2056, 20 L. Ed. 2d 1364 (1968) to support this assertion is misplaced. In both these cases, courts upheld governmental authority to cancel leases based on errors, making them void *ab initio*. These rulings have no application here where the Woods Leases, and the rights granted by them, are indisputably valid.

[8]Contrary to the Tribe, the Federal Respondents ``agree with Woods that there is tension between the judgments in this case and in *Cotton*. Federal Opposition at 16.

Tribe's Opposition at 16-17. Quite to the contrary, judicial review in *Cotton* was of the Secretary's *rejection* of a proper communitization agreement for the purpose of causing the expiration of a single existing lease.[9] *Id.*, 870 F.2d at 1517. The only distinction between the two cases is that here the Court of Appeals itself, not the Secretary, attempts to achieve the exact result prohibited by *Cotton*.[10] It is this very inconsistency, Woods urges, that necessitates this Court's exercise of supervisory authority over the Court of Appeals.[11]

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[9]The only ``approval'' of the Secretary that was rejected in *Cotton* was the Secretary's attempt to disapprove communitization in order to cause an existing lease to expire *and then* to approve identical communitization so as to include the same Indian tract as unleased land. *Cotton*, 870 F.2d at 1520-21, 1527. Interestingly, it is this same improper type of ``qualified'' or ``limited'' invalidity that the Tribe urges again in its first argument in opposition to Woods' Petition here. Tribe's Opposition at 9-13.

[10]In *Cotton*, the court held that the review of a communitization agreement must result in a decision based on the merits of communitization and not on a desire to terminate existing leases. 870 F.2d at 1527-28. This exact improper result was sought by the Tribe below, rejected by the Secretary, but erroneously granted by the Court of Appeals.

[11]The Federal Respondents suggest that the Court of Appeals decision in *Cotton* not to remand to the Secretary somehow justifies its failure to do so here. This implication ignores a critical factor underlying the *Cotton* decision. In *Cotton*, the facts underlying communitization were undisputed. *Id.*, 870 F.2d at 1520. Thus, the Court of Appeals was unable to rule that non-inclusion of a single lease in the communitized area for one purpose, but including it for others was arbitrary and capricious *as a matter of law*. *Id.* at 1527-28. Here, a dispute of fact, *i.e.*, whether communitization was in the best interest of the Tribe, exists. The *judicial* resolution of this factual issue usurps the exclusive administrative discretion of the Secretary where *Cotton* did not.

III. SPECIAL AND IMPORTANT QUESTIONS EXIST HERE

Respondents contend that questions of sufficient importance to justify a grant of certiorari are not present here. Woods respectfully disagrees.

The Tribe admits the national importance of the issues presented but argues that the issues are not likely to reoccur. Tribe's Opposition at 18. This conclusion is incorrect. The issues presented here are: (1) the unwarranted judicial intervention into the exclusive discretionary authority of an administrative agency, and (2) an irreconcilable conflict between the rulings of two courts of appeals. Petition at i. In light of the vast mineral holdings of protected American Indians supervised by the United States government, the large monetary value of these interests and the fact that the fundamental tension between the structure of state conservation law and federal Indian law remain the same, disputes such as this will reoccur absent a definitive resolution by this Court.

The Federal Respondents have agreed that the Court of Appeals erred in failing to remand to the Secretary. Federal Opposition at 12 (``We agree that if an administrative agency `has not considered all relevant factors, * * * the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'''') *Id.* (citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985). The Federal Respondents, however, assert that this remand issue does not warrant review because it ``is of little importance to anyone but the parties in this case.'' *Id.* at 12-13.[12]

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[12]The Federal Respondents' reliance on *Maine v. Taylor*, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986), and *United States v. Mendoza*, 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984), for this proposition is misplaced. In both these cases, the only appellate review issue presented was the government's discretion in determining which actions *it* will appeal. *Taylor*, 477 U.S. at 136 n.5; *Mendoza*, 464 U.S. at 160. These rulings do not in any way minimize the importance of the questions presented by private litigants or the propriety of this Court's grant of certiorari in such cases.

While the unconstitutional taking of Woods' property is certainly most important to Woods itself, the Federal Respondents' position simply ignores the overriding issues -- the federal courts have, without justification, supplanted administrative authority in violation of federal statute. *See* 5 U.S.C. § 706(2)(A). The granting of certiorari and issuance of instructions to the Court of Appeals here will preclude this same dispute from being replayed in a variety of administrative review scenarios not limited to Indian issues.

CONCLUSION

By its rulings below, the Court of Appeals for the Tenth Circuit has chosen to ignore both the exclusive discretionary authority of the Secretary and the precepts of existing law. Woods Petroleum Corporation respectfully requests that this Court grant its Petition for Writ of Certiorari in order to give guidance to the courts below.

Respectfully submitted,
HALL, ESTILL, HARDWICK, GABLE,
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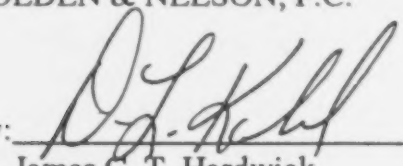

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